

Hungary's Orbánistan: A Complete Arsenal of Emergency Powers

Kriszta Kovács

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On 23 March 1933, an act was adopted in Nazi Germany in response to the “crisis” of the Reichstag fire to enable Hitler to issue decrees independently of the Reichstag and the presidency. Article 48 of the constitution of the Weimar Republic made this act possible. Eighty-seven years later, on 23 March 2020, the so-called 'Enabling Act' was put before the Hungarian Parliament. This was drafted under emergency constitutional provisions in Articles 48-54.

Emergency Powers under the Hungarian Constitution

That might be only a strange coincidence, but it is [not](#) the first time, that Hungarian Prime Minister Viktor Orbán has jumped on a crisis to increase his power. He came to power in 2010, and since then, he has created a whole array of measures and processes in response to some “crisis” situation. In 2011, a parliamentary supermajority justified the adoption of a new constitution with reference to the consequences of the 2008 global financial crisis and the country's high level of public debt. The ruling majority gave its crisis management policy a constitutional rank: the 2011 constitution contains a debt ceiling, and it deprives the Constitutional Court of its power to review financial laws. These measures were framed as being a response to the financial crisis, but they stayed on as legislation beyond the crisis.

The constitution, which has been referred to as a “crisis management constitution” contains a detailed set of prescriptions for the state authorities to respond to emergencies. [Articles 48–54](#) provide for special emergency powers in case of an imminent danger of war and external armed attack and in the event of a natural or industrial disaster. It contains an exhaustive list of situations in which the country could be deemed under threat, and it does not provide for the suspension of constitutional rights in other situations.

Since mass migration was not among the constitutionally listed situations that justify the introduction of emergency rule, in 2016, the Hungarian government [used](#) a very vague constitutional authorisation provided by Article 15 (1) of the constitution (“the Government shall exercise powers which are not expressly conferred by laws on another state body”) to declare “a nationwide state of crisis due to mass migration”. The government [defined](#) the crisis in terms of the number of asylum seekers arriving, either 500 per day for a month or 800 per day for a week. Today, the “state of crisis due to mass migration” is still in effect, because the government keeps renewing it every six months, most recently on 5 March, even though the

border to Serbia is hermetically [sealed](#) and not a single migrant can enter Hungary's territory.

The “Enabling Act”

Referring to the same vague constitutional authorisation given by Article 15(1), on 11 March, the government declared a “[state of danger because of the pandemic](#)”. The decree also cited the state of danger clause (Article 53), although this Article does not mention the possibility to declare a state of danger in a case of an epidemic or a pandemic. More importantly, the constitution allows the government to introduce extraordinary measures that are laid down in a cardinal law, that is, an act passed by a two-thirds majority. However, the governing supermajority has not yet adopted this act.

The decree on the pandemic emergency had an automatic sunset after 15 days without parliamentary authorisation. Thus, on 23 March the government submitted the [Act on Protecting against the Coronavirus](#) to parliament to ask for the decree to remain in legal effect. The Hungarian public has called it the Enabling Act because it gives the government a parliamentary mandate to rule by decree without a sunset clause, although even the eponymous act from 1933 was to last four years and subsequently renewed twice by the Reichstag. The Hungarian Parliament is still in session, but the act gives the government the power to take extraordinary measures, including suspending or abrogating statutory provisions without parliamentary approval during the crisis.

Hence, it is the prime minister who decides how to respond to the crisis and when the crisis ends. The argument went that without this decree, the government would not be able to respond to the crisis, so there was an urgent need to adopt the act in an expedited procedure. The democratic parliamentary opposition was unified in rejecting the expedited procedure, so the decree expired on 26 March. In the interim period, between 26 March and 30 March, the [government](#) and the [head](#) of the National Public Health Centre issued new orders on restrictions on movement. In the process, the government itself demonstrated that it could issue the regulations necessary to protect citizens without having emergency powers or gaining further competences.

Lockdown of Democracy

Despite all that, the governing parliamentary supermajority passed the Enabling Act on 30 March. The Enabling Act has not fixed the errors mentioned above or filled the legislative gaps. On the contrary, it has exacerbated the problems. The Enabling Act further decreases the enforceable checks on the executive's authority. It cancels elections and referenda until the crisis is over, thus, byelections will not happen to fill future vacant seats. Moreover, the act introduces rules to curb the remaining free press further by criminalising the obstruction of epidemiological control and the publication of false or distorted facts that interfere with the “successful protection” of the public. Both crimes are broad enough to be [used against critics](#) who challenge

the governmental measures, and both will remain part of the legal system even when the pandemic is over.

Citing coronavirus, the Orbán government quickly closed down ordinary courts before it closed down the schools. Thus, the courts are not in a position to decide *posteriorly* on the proportionality of the extraordinary measures adopted. The only non-governmental state institution which continues in operation is the Constitutional Court, but it cannot serve as a check on the government. Cases can come to the Constitutional Court through the ordinary courts, but since the courts are in recess, this avenue is blocked. Certain officials (e.g. the prosecutor general, ombudsman, the government) may ask for constitutional review, but the government is unlikely to ask for a review of its legal measures, and the state officials were all chosen by this government from among those friendly to their party. More importantly, although there is still a mechanism by which one-fourth of the MPs – that is, members of the parliamentary opposition – can bring review cases, the court has been packed with political allies, so the impartial constitutional review is little more than illusory.

We often hear that extraordinary situations might require extraordinary responses. Indeed, when taking action against the coronavirus, it might be justified to restrict some of our fundamental rights (e.g. right to assembly, freedom of movement) in proportion with the danger. It might also be justifiable to rationalise the functioning of the democratic institutions, for instance, by limiting public access to court buildings. One can even imagine that the operation of democratic institutions might be temporarily suspended, and the distribution of powers modified in favour of the executive in order to manage the crisis. Nevertheless, the crisis does not empower the executive to make any permanent changes in the legal system. That is because the primary purpose of declaring a state of emergency is to manage the crisis with a view to restoring the democratic legal order and ensuring the full enjoyment of human rights once the crisis is over. Thus, we should be extremely suspicious of all acts that are passed in moments of crisis.

It is in that spirit that the Council of Europe's [Secretary-General](#), the [Civil Liberties Committee](#) of the European Parliament and the [UN High Commissioner for Human Rights](#) raised concerns about the impact of the Enabling Act. The [response](#) by Viktor Orbán was the following: If you cannot help, fine, the least you can do is not hinder the country from defending itself on its own soil. We are at war, he [said](#), and the country is operating on a military plan.

Indefensible War Rhetoric

Under Orbán, Hungary has become a deeply militarised country. In a Schmittian sense, distinctions between the political friend and foe have been repeatedly mobilised to create a “crisis” situation, in which ordinary norms are suspended. The government felt inclined to “wage war” against the financial crisis, against the “illegal migrants”, against the “terrorists” and most recently, against the “[invisible and unknown enemy](#)” called the novel coronavirus. The Coronavirus Operational Group consists of many more army commanders in uniforms than healthcare professionals. There is an increased military presence in hospitals: generals and colonels are

taking part in decisions on the epidemic. The military has [sent](#) control teams to the country's strategic companies to "ensure secure operations of key companies in telecommunications, transport and health care". Those in compulsory home quarantine [are obliged](#) to post a sign from the authorities ("a red card") on their door to warn others that a potentially infected person inside is under disease control observation. Slovak Prime Minister Igor Matovič [has condemned](#) the regulation requiring special signs on doors and compared the red card houses to the yellow star houses, that is, the designated compulsory places of residence for Budapest's Jews in the Second World War.

The war rhetoric has had further consequences as well. People are queuing for [guns](#) and find it reassuring to have one at home because they fear that once the pandemic reaches its peak, the state will not be able to keep "law and order". The strong man image Orbán is trying to convey has not been able to comfort people and integrate society. On the contrary, all of his political steps have had the effect of paralysing public services, turning people against each other and weakening the cohesiveness of society.

